IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
CRIMINAL APPEAL NO.322 OF 1996

The State of Maharahstra — Appellant

Vs.

1. Murad Mahamud Shekh Hasan
2. Mubarak @ Gharya Mahamud Shekh Hasan
3. Satish @ Gotya Shrikant Lakare
4. Uday Shankar Panase — Respondents (Org.Accused)

Ms.P.H.Kantharia, APP for State.
Advocate for respondents absent.

CORAM: S.S.PARKAR & ANOOP V. MOHTA,JJ.
August 23, 2005.

ORAL JUDGMENT (PER S.S.PARKAR,J.)

1. This appeal is filed by the State challenging the order of acquittal recorded by the Addl. Sessions Judge, Ratnagiri by his judgment and order dated 6th March 1996 acquitting all the respondents-accused of the offences under Sections 147, 148, 307, 324 and 452 all read with Section 149 of IPC with which they were charged in Sessions Case No.5 of 1995.

2. This appeal reached in the normal course for hearing on 19th August 2005 at 3 p.m. On that day Advocate for the respondents-accused was absent. The word was sent in the bar-room where he sits normally

that his matter has reached for hearing but he did not turn up. With the assistance of the APP we went through the evidence and also perused the reasoning of the trial Court. Thereafter the matter was adjourned to 22nd August 2005. On that day also the matter reached for hearing at 3 p.m. but none was present in the appeal i.e. APP as well as the Advocate for the accused were absent and, therefore, we adjourned it to today. Today the matter reached at 1-30 p.m. but again none was appearing for either side and, therefore, we kept the matter at 3 p.m. Now at 3 p.m. also both the APP as well as the Advocate for the respondents are absent. Since we have gone through the evidence on record and perused the reasoning of the trial Court we had no option but to proceed with delivering the judgment.

3. The prosecution case briefly stated is as follows:

. The incident had taken place on 25th January 1994 when the complainant Rozina and her husband Abdul Bijali Khan were assaulted by the accused, main of whom were residing in the adjoining house. At the relevant time the husband of the complainant was a

member of the Municipal Council of Ratnagiri. He along with his wife and children were residents of Rajiwada. The absconding accused Navshad was residing in the adjoining house belonging to the complainant's husband. Two days prior to the incident i.e. on 23rd January 1994 there was quarrel between PW 2 Abdul and absconding accused Navshad on the ground that the latter had kept girls in his house for illicit purpose. Abdul had told Navshad that he should not keep girls in his house. On 25-1-1994 when the complainant and her husband were in their house at about 8.50 p.m. their door was knocked. When the husband opened the door he was assaulted by Navshad and other accused with swords and other weapons. When wife tried to protect her husband, she was also injured. The husband received several grievous injuries on his person and, therefore, was removed to Civil Hospital, Ratnagiri for treatment. Report of wife Rozina was filed by the City Police Station on the basis of which crime was registered. The statements of the witnesses were recorded and the accused were arrested. After completion of the investigation the charge-sheet was filed for the offences under Sections 147, 148, 307, 324 and 452 read with Section 149 of IPC and the case

was committed to the Sessions Court.

4. Before the Sessions Court charges were framed for the aforesaid offences to which the accused pleaded not guilty. It is the defence of the accused that injured Abdul had engaged services of Navshad, the absconding accused for construction and, therefore, wanted half share in the house which was disputed by Abdul and, therefore, the present case was filed falsely.

5. On behalf of the prosecution eight witnesses have been examined. PW 1 is Rozina Abdul Khan who is injured complainant. PW 2 is Abdul Bijali Khan, the husband of the complainant who was severely injured. PW 3 is Zikriya Hasan Miya Hodekar who was also eye witness to the incident of assault. PW 4 is Chandrakant Pathak who had acted as panch for recovery of auto-rickshaw. He had turned hostile. PW 5 is Rashik Khalpe who was punch for recovery but had turned hostile. PW 6 is Dr. Nilendra Bhole who had examined the complainant and the injured, PW 1 and PW 2. PW 7 is police witness Popat Ahivale who had recorded the FIR and registered the crime. PW 8 is PSI Suryakant Patil who investigated the case.

After considering the evidence on record the trial Court acquitted all the respondents-accused of all the offences with which they were charged. Hence the present appeal is filed by the State challenging the order of acquittal.

6. It may be mentioned at the outset that Navshad, the main accused had been absconding and, therefore, four accused persons including two brothers of Navshad, Murad and Mubarak were tried before the Additional Sessions Judge, Ratnagiri. The main injured witness is PW 2 Abdul Bijali Khan who was severely injured. He has deposed that on 23rd January 1994 he had asked Navshad, brother of respondent nos.1 and 2 that he should not keep girls in the house of the witness. According to him the neighbours had complained to him that Navshad had brought girls and kept in the house. He, therefore, locked the house because of which Navshad filed complaint against him at the police station. The police had arrested him. On the following day i.e. 24th January 1994 absconding accused Navshad and accused no.1 Murad threatened him that he would be stabbed. Therefore, he had submitted a complaint against Navshad to the Superintendent of Police. On

25th January 1994 in the night at about 9.30 p.m. his door was knocked. When he opened the door Navshad and accused no.1 Murad entered the house. They were armed with swords and accompanied by other accused. First Navshad attacked him on his cheek as a result of which he received bleeding injury. Accused no.1 Murad assaulted him on the left side of the body. When his wife fell on him to rescue him she also sustained injuries. His clothes were stained with blood. He had received injuries on his thighs and both the hands and, therefore, he fell on the ground. Thereafter the accused ran away and he was taken to the hospital where he was operated. His evidence is supported by his wife who was also injured. She was also taken to the hospital along with her husband where her first information report was lodged and the crime was registered. She has also stated that Navshad and other three accused persons had been to their house and had assaulted her husband and herself. They were armed with swords and other small weapons. The prosecution has also examined PW 3 Zikriya Hodekar as an eyewitness. He has supported the prosecution to the extent that he had seen Navshad and others enquiring about Abdul who was member of the Municipal Council and he had seen

them going to his house. He also deposed that they were armed with swords and after some time he saw them running away from the place of offence. The evidence of the complainant is also corroborated by the immediate complaint lodged by her in which she had named absconding accused Navshad and accused no.1 Murad. That complaint is produced on record at Exhibit 29.

7. The evidence of the aforesaid injured eye witnesses is corroborated by the medical evidence. PW 6 Dr.Bhole had examined both the injured in the civil hospital on 25-1-1994 at about 9.30 p.m. According to his evidence injured Abdul Khan had received the following injuries:

(1) Clean incised wound on Rt.side of face extending from Rt. ear pinna to the filtrum.

Size 6" x 1" oral cavity deep.

Massetar Muscle cut. Parotid gland cut. Fascial nerve injury. Fracture alveolar ridge Rt.side.

Fracture of maxill.

1st, 2nd and 3rd molar avulsed. Grievous.

(2) Clean incised wound on dorsum of left head size 3 cm. x 2 cm. Fracture 2nd - Metacarpal left Extensor tendons of 2nd and 3rd fingers cut.

(3) Clean incised wound over rt. deltoid region 8" x 4" compound fracture surgical neck of humours Deltoid muscle cut. Grievous in nature.

(4) Clean incised wound over Rt.Deltoid region 10" x 4" x 3" Cortical fracture. Humerus Deltoid muscle cut. Grievous in nature.

(5) Clean incised wound on posterior aspect of Rt. shoulder 5 cm. x 3 cm. Simple in nature.

(6) Two clean incised wounds on posterior aspect 2 cm. x 2 cm. x 1 cm. Simple in nature.

(7) Clean incised wound on forearm M/3 - Compound cortical fracture. Muscle cut.

(8) Incised wound dorsum of hand 5 cm. x 1/2 cm. Superficial. Simple in nature.

(9) Incised wound (two) on lateral aspect of Rt. thigh 4 cm. x 1/2 cm. Simple in nature.

(10) Two incised wounds on left scapula - 3 cm. x 2 cm. Simple in nature.

He has deposed that Abdul Khan was operated immediately by a team of General Surgeon, Orthopaedic Surgeon and Dental Surgeon. He has proved certificate (Exh.39) issued by him in respect of the said injured. According to him all the injuries could be caused by sharp edged weapon like sword. He has also deposed that injuries on the person of Abdul Khan could be caused by weapon like article No.6 before the Court. According to him X-ray plates of all the injuries were taken. It is relevant to

mention that most of the injuries suffered by Abdul Khan were incised wounds. There were fractures of alveolar ridge of right side and of maxill. The doctor also noticed fracture of 2nd metacarpal left extensor tendons of 2nd and 3rd fingers and compound fracture surgical neck of humours deltoid muscle. There was also cortical fracture and compound cortical fracture. According to the Medical Certificate (Exh.39) four injuries sustained by Abdul Khan have been described as grievous.

8. PW 6 Dr.Bhole has also deposed that complainant Rozina had received following injury:

> Superficial clean incised wound which was simple in nature which was caused by sharp weapon as per certificate (Exh.40).

Thus she had also received incised wound, though simple, which could be caused by sharp weapon like sword. Thus the ocular evidence is corroborated squarely by the immediate complaint lodged by the injured wife and by the medical evidence. Both the injured were taken to the Civil Hospital immediately after the incident where they were treated. Injured Abdul Khan was admitted in the hospital same night and was discharged from the hospital on 13/2/1994.

Thus he was in the hospital for a period of 20 days from 25th January 1994 to 13th February 1994. The aforesaid evidence is further corroborated by the recovery of weapons. On 26th January 1994 PSI Pathak had seized an auto-rickshaw and a sword under panchanama (Exh.51). As per the CA report dated 31st March 1994 (Exh.48) the sword (article no.6) was found stained with blood of group "B" as well as group "O". As per the CA report dated 31st March 1994 (Exh.49) blood of injured Abdul Bijali Khan was of "B" group while as per the CA report dated 31st March 1994 (Exh.50) the blood of complainant Rozina was of "O" group. Thus the blood of both, the injured husband as well as wife, was found on the sword which was attached from the auto-rickshaw. That sword was recovered at the instance of the auto-rickshaw driver in whose presence absconding accused had kept it. Since that recovery was not made at the instance of any of the present accused, the said circumstance cannot be relied on. In any way the evidence of the injured eye witnesses corroborated by the immediate complaint lodged by one of the injured and supported by the medical evidence leaves no manner of doubt that on the date, time and place of incident PW 2 was assaulted with weapons

like sword by absconding accused Navshad and his brother Murad accused no.1. Out of the present respondents-accused, name of Murad was mentioned in the FIR. Both the injured witnesses have deposed and named him as one of the assailants along with the absconding accused Navshad who was none other than his brother. The involvement, therefore, of Murad in the assault cannot be doubted. However, Murad's another brother accused no.2-Mubarak, accused no.3-Satish Lakare and accused no.4-Uday Ranase cannot be said to be involved with any certainty as their names have not been mentioned in the FIR and no specific assault by name was attributed to them. The only allegation is that the other accused also assaulted PW 2 Abdul Khan. In that view of the matter the order of acquittal of respondents - accused nos.2, 3 and 4 cannot be interfered with as the view taken by the trial Court cannot be said to be perverse or not a possible view.

9. The trial Court has, however, acquitted all the accused including Murad who has been named in the FIR as well as attributed assault on PW 2 Abdul Khan for reasons which, in our view, cannot be sustained. Firstly the trial Court has held that the motive was

not proved as it was improbable that Navshad would keep girls in the house for illicit purposes when he was residing there with his family members. Firstly, it is the case of the injured witness that he was told by the neighbours of Navshad that Navshad was keeping girls in his house for illicit purpose. Secondly that the quarrel had taken place between the two on 23rd January 1994 cannot be doubted as there was mention about the same in the FIR also. Because of the allegation by injured Abdul that Navshad was keeping girls in his house for illicit purposes, there was also complaint lodged against him with the police as Abdul Khan had locked the house of Navshad. In any event absence of motive cannot be used to belie the evidence of injured eye witnesses when their ocular testimony is supported by the injuries received by them.

10. The trial Court has also given benefit to the accused due to the minor discrepancies in the evidence. The trial Court has observed that complainant-Rozina had given only the names of Murad and Navshad and not other accused. She was not bound to know the names of all the accused. The trial Court has also given benefit to the accused as the

complainant-Rozina had stated that when the door of their house was knocked from outside, she had told that her husband was not present in the house and thereafter he opened the door, while Abdul had stated that when the door was knocked, he opened the door and thereafter he was assaulted. The trial Court has also given benefit to the accused on the ground that the prosecution had not examined Rauf Ajij Sheikh and Ishamuddin who, according to PW 2, had seen assault on him. It is well settled that the evidence of injured eye witness cannot be discarded on the ground that independent witness had not been examined. It is common knowledge that independent witnesses hardly come forward to give evidence against the accused persons in a criminal trial. The evidence of complainant Rozina and her seriously injured husband cannot be discarded as being that of interested witnesses as observed by the trial Court. The trial Court has also discarded the prosecution evidence on the ground that there was discrepancy as to where the complaint or report of Rozina was recorded, whether in the hospital or at the police station. The fact remains that immediately after the incident when the injured were taken to the Civil Hospital, the statement of Rozina was recorded on the basis of

which crime was registered at the police station. Similarly because according to the Medical Officer on enquiry Abdul Khan told him that he was attacked by Navshad does not mean that other accused had not assaulted the injured. Name of Navshad must have been mentioned as he was the main accused who was absconding from the day of the offence. The trial Court has also disbelieved the two witnesses on the ground that no identification parade was held. When the accused were known and named, particularly accused no.1-Murad along with the absconding accused Navshad, there is no question of holding T.I. parade so far as complainant Rozina is concerned. Of course injured Abdul Khan was knowing all the accused persons who had named them in his statement as well as in his deposition. The trial Court has then observed in paragraph 19 of the judgment that when according to the injured witnesses Rozina and Abdul Khan all five persons had made attack at one and the same time definitely death of both the injured would have occurred or at least both of them would have seriously been injured. From the nature of injuries we do not think that there was intention on the part of the accused to commit murder of the injured witnesses. The absence of recovery of other small

weapons referred to by the witnesses cannot also be the ground to disbelieve the prosecution case.

11. It is also pertinent to note that though Navshad was residing in the neighbourhood he has remained absconding till the trial took place in this case. Even the other accused persons were absconding immediately after the incident. Accused no.1-Murad, who was named in the FIR, could be arrested as late as on 4th April 1994 and his brother Mubarak-accused no.2 was arrested on 8-4-1994. Thus the non-availability of Murad for arrest for more than two months is also a significant circumstance against Murad who was named in the FIR.

12. Considering the aforesaid evidence, we are of the view that there is no sufficient evidence to interfere with the order of acquittal of respondents - accused nos.2, 3 and 4. However, there is sufficient evidence to interfere with the acquittal order of accused no.1-Murad who was named in the FIR and PW 2 injured Abdul Khan had specifically attributed assault to Murad. Murad being the brother of the main accused Navshad and who had also threatened the injured witness a day earlier on 24th

January 1994 to stab, the order of acquittal of the said accused cannot sustain. The order of acquittal of Murad is undoubtedly illegal and against the evidence on record. He can definitely be said to have common intention with Navshad for causing injuries sustained by Abdul Khan on the night of incident.

13. This leaves us to consider what offence Murad can be said to have committed. Though allegation was that there were several persons but only five persons have been named as accused. Accused nos.2, 3 and 4 were not even named in the complaint. Therefore, the offences under Sections 147 and 148 cannot be said to have been proved. As per the evidence of Dr.Bhole PW 6 none of the injuries sustained by injured were dangerous to his life and, therefore, offence under Section 307 also was not proved. Considering the grievous injuries sustained by Abdul Bijali Khan and that he was in the hospital for a period of 20 days, offence under Section 326 read with Section 34 of IPC is proved against Murad so also the offence of house trespass under Section 452 of IPC as he had entered in the house along with absconding accused Navshad as per the evidence of the injured eye witnesses.

Under section 326 voluntarily causing grievous hurt by dangerous weapons or means is punishable with imprisonment for a term which may extend to ten years and also liable to fine. The maximum punishment for the said offence is also life imprisonment. Under Section 452 whoever commits house-trespass after preparation for hurt or assault is liable to be punished by imprisonment of either description for a term which may extend to seven years and is also liable to fine. From the record it appears that accused no.1-Murad was in custody for a period of one year and eleven months. He was arrested on 4th April 1994 and was released after the order of acquittal on 6th March 1996. The offence had taken place in January 1994 i.e. about eleven years ago and, therefore, considering that the main attack was made by the absconding accused, the period of imprisonment undergone by accused no.1-Murad is sufficient punishment.

14. In the result, the appeal is partly allowed. While the order of acquittal of respondent nos.2 to 4 - original accused nos.2 to 4 recorded by the Addl.Sessions Judge, Ratnagiri in Sessions Case No.5 of 1995 is confirmed, the order of acquittal in

respect of respondent no.1 - accused no.1 - Murad Mahamud Shekh Hasan is set aside and he is convicted for offence under Section 326 of IPC and sentenced to imprisonment already undergone and to pay a fine of Rs.1000/- in default to undergo imprisonment for one month. He is also convicted for offence under Section 452 of IPC and sentenced to imprisonment already undergone and to pay a fine of Rs.1000/- in default to undergo imprisonment for one month.

(S.S.PARKAR,J.)

(ANOOP V.MOHTA,J.)